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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/662,678	09/15/2003	John P. Troup	8493-US	1877
74476	7590	02/17/2011		
Nestle HealthCare Nutrition			EXAMINER	
12 Vreeland Road, 2nd Floor, Box 697			HA, JULIE	
Florham Park, NJ 07932			ART UNIT	PAPER NUMBER
			1654	
NOTIFICATION DATE	DELIVERY MODE			
02/17/2011	ELECTRONIC			

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentdepartment@rd.nestle.com  
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<b>Advisory Action Before the Filing of an Appeal Brief</b>	<b>Application No.</b> 10/662,678	<b>Applicant(s)</b> TROUP ET AL.
	<b>Examiner</b> JULIE HA	<b>Art Unit</b> 1654

***–The MAILING DATE of this communication appears on the cover sheet with the correspondence address –***

THE REPLY FILED 10 January 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

a)  The period for reply expires \_\_\_\_ months from the mailing date of the final rejection.  
 b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a)  They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b)  They raise the issue of new matter (see NOTE below);  
 (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_

Claim(s) objected to: \_\_\_\_\_

Claim(s) rejected: \_\_\_\_\_

Claim(s) withdrawn from consideration: \_\_\_\_\_

**AFFIDAVIT OR OTHER EVIDENCE**

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
 Please see continuation of 11 below.

12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_

13.  Other: \_\_\_\_\_

/Julie Ha/  
 Primary Examiner, Art Unit 1654

## Continuation of 11:

Claims 1-4, 7-11, 13-14, 16-17 and 23-28 remain rejected under 35 U.S.C. 103(a) as unpatentable over Abbruzzese et al (US Patent No. 6,077,828) as evidenced by Roberts (US Patent No. 4,112,123), in view of Hageman et al (US Patent No. 6,420,342) and Salvati et al (US Patent No. 6,953,679) and Vickery (US Patent No. 6,203,820) as set forth in the previous office action.

Applicant argues that "Independent claims 1-3, 17, 23-25 and 28 recite...compositions having leucine, valine in an amount of about 8% to about 10% by weight based on the weight of total amino acids..." Applicant argues that "At no place in the disclosure does Roberts disclose or suggest compositions containing about 8% to about 10% of valine as required, in part, by the present claims."

Applicant's arguments have been fully considered but have not been found persuasive. As indicated in the previous office action, Vickery et al teach a composition for enhancing protein anabolism and nutritional composition comprising L-arginine, L-cysteine, L-histidene, L-isoleucine, L-leucine, L-lysine, L-methionine, L-phenylalanine, L-threonine, L-tryptophan, L-tyrosine, and L-valine. Vickery teaches a nutritional composition present in an amount of from about 7% to about 10% by weight, from about 8% to about 9% by weight. Therefore, it would have been obvious for one of ordinary skill in the art to combine the teachings of Abbruzzese et al, Hageman et al, Salvati et al and Vickery reference to produce a kit comprising the anti-cancer agent with the nutritional composition, since all of the prior art teach nutritional composition. One of ordinary skill in the art would be motivated to optimize the amount of leucine and valine in the nutritional composition, since it is known in the art that leucine is useful in lowering blood sugar, stimulating protein synthesis in muscle and wound healing of skin and bone, and valine aids in wound healing, muscle growth and liver diseases.

Claims 1-4, 7-11, 13-14, 16 and 23-26 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Abbruzzese et al (US Patent No. 6,077,828) as evidenced by Roberts (US Patent No. 4,112,123), in view of Allen et al (US 2003/0119888) and Phillips Bill (Sports Supplement Review) and Vickery (US Patent No. 6,203,820) as set forth in the previous office action.

Applicant argues that "Abbruzzese, Roberts, Hageman, Salvati, Allen, Phillips and Vickery all fail to disclose or suggest compositions having leucine, valine in an amount of about 8% to about 10% by weight based on the weight of total amino acids..."

Applicant's arguments have been fully considered but have not been found persuasive. Each of the cited references teach nutritional composition comprising the active components of instant claims. Each of the references teach why each component is important in nutritional composition. As indicated in the previous office action, Vickery et al teach a composition for enhancing protein anabolism and nutritional composition comprising L-arginine, L-cysteine, L-histidene, L-isoleucine, L-leucine, L-lysine, L-methionine, L-phenylalanine, L-threonine, L-tryptophan, L-tyrosine, and L-valine. Vickery teaches a nutritional composition present in an amount of from about 7% to about 10% by weight, from about 8% to about 9% by weight. Therefore, it would have been obvious for one of ordinary skill in the art to combine the teachings of Abbruzzese et al, Allen et al, Phillips and Vickery reference because all references teach nutritional compositions comprising differing amounts of protein and essential amino acids (such as leucine) for the same purpose (muscle enhancement). One of ordinary skill in the art would be motivated to optimize the amount of leucine, isoleucine and valine in the nutritional composition, since it is known in the art that leucine, isoleucine and valine play an important role in muscle enhancement. Both Allen and Phillips references were utilized to show the important role leucine plays in muscle enhancement. Vickery teaches that leucine is useful in lowering blood sugar, stimulating protein synthesis in muscle and wound healing of skin and bone, and valine aids in wound healing, muscle growth and liver diseases. Therefore, one of ordinary skill in the art would have been motivated to optimize the concentrations of different amino acids, especially leucine, isoleucine and valine to stimulate muscle growth, to arrive at the optimal composition for the treatment of muscle enhancement for cancer patients.

Claims 1, 23-25 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Heyland et al (US Patent No. 4,544,568) in view of Vickery (US Patent No. 6,203,820) as set forth in the previous office action.

Applicant did not respond to this rejection.

The rejection is maintained as set forth in the previous office action.